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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
10/082,343	02/26/2002	Kenichi Ueyama	219735US3	4098
22850	7590	06/17/2004	EXAMINER	
OBLON, SPIVAK, MCCLELLAND, MAIER & NEUSTADT, P.C.				COMSTOCK, DAVID C
1940 DUKE STREET				ART UNIT
ALEXANDRIA, VA 22314				PAPER NUMBER
				3732

DATE MAILED: 06/17/2004

Please find below and/or attached an Office communication concerning this application or proceeding.

Office Action Summary	Application No.	Applicant(s)	
	10/082,343	UEYAMA ET AL.	
	Examiner	Art Unit	
	David Comstock	3732	

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If the period for reply specified above is less than thirty (30) days, a reply within the statutory minimum of thirty (30) days will be considered timely.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133).

Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

Status

- 1) Responsive to communication(s) filed on 23 March 2004.
- 2a) This action is **FINAL**. 2b) This action is non-final.
- 3) Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

Disposition of Claims

- 4) Claim(s) 1-17 is/are pending in the application.
 - 4a) Of the above claim(s) _____ is/are withdrawn from consideration.
- 5) Claim(s) _____ is/are allowed.
- 6) Claim(s) 1-17 is/are rejected.
- 7) Claim(s) _____ is/are objected to.
- 8) Claim(s) _____ are subject to restriction and/or election requirement.

Application Papers

- 9) The specification is objected to by the Examiner.
- 10) The drawing(s) filed on 26 February 2002 is/are: a) accepted or b) objected to by the Examiner.

Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).

Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).
- 11) The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

Priority under 35 U.S.C. § 119

- 12) Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
 - a) All b) Some * c) None of:
 1. Certified copies of the priority documents have been received.
 2. Certified copies of the priority documents have been received in Application No. _____.
 3. Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

* See the attached detailed Office action for a list of the certified copies not received.

Attachment(s)

- 1) Notice of References Cited (PTO-892)
- 2) Notice of Draftsperson's Patent Drawing Review (PTO-948)
- 3) Information Disclosure Statement(s) (PTO-1449 or PTO/SB/08)
Paper No(s)/Mail Date _____.
- 4) Interview Summary (PTO-413)
Paper No(s)/Mail Date. _____.
- 5) Notice of Informal Patent Application (PTO-152)
- 6) Other: _____.

DETAILED ACTION

Claim Rejections - 35 USC § 101

35 U.S.C. 101 reads as follows:

Whoever invents or discovers any new and useful process, machine, manufacture, or composition of matter, or any new and useful improvement thereof, may obtain a patent therefor, subject to the conditions and requirements of this title.

Claim 2 is rejected under 35 U.S.C. 101 because the claimed invention is directed to non-statutory subject matter. The claim positively recites part of the human body in combination with the device, i.e. "a plurality of heating parts in which said tied hair is wrapped." It has been held that a claim directed to or including within its scope, a human being will not be considered to be patentable subject matter under 35 U.S.C. 101. The grant of a limited, but exclusive property right in a human being is prohibited by the constitution. *In re Wakefield*, 422 F.2d 897, 164 USPQ 636 (CCPA 1970). For examination purposes, claim 2 will be considered as if such limitations involving the combination with a human were not present.

Claim Rejections - 35 USC § 102

The following is a quotation of the appropriate paragraphs of 35 U.S.C. 102 that form the basis for the rejections under this section made in this Office action:

A person shall be entitled to a patent unless –

(b) the invention was patented or described in a printed publication in this or a foreign country or in public use or on sale in this country, more than one year prior to the date of application for patent in the United States.

Claims 1, 2, 8, and 9 are rejected under 35 U.S.C. 102(b) as being anticipated by Viltro et al. (5,837,005).

Viltro et al. disclose a warming pad 10 of sheet form having a plurality of heating parts 16 in the center thereof and a margin around the heating parts, i.e. the border around each of the heating parts 16 (see Figs. 1, 2, and 4; col. 3, line 34). The heating part includes an oxygen (from ambient air) activated heat generating material 18 which contains iron powder, activated charcoal, vermiculite (a moisture-retaining element), water, and salt (i.e. sodium chloride) (see col. 2, lines 29-32). The pad is capable of being wrapped around a user's hair with either the release paper still attached or in the embodiment with alternative fastening means, since the sheet is flexible and of a generally appropriate size, (see Figs. 1 and 2; col. 3, lines 55-57; and col. 4, lines 15-34).

Claims 3, 4, 10, and 11 are rejected under 35 U.S.C. 102(b) as being anticipated by Zeoli-Jones (5,840,418).

Zeoli-Jones disclose a method and device for treating hair comprising applying an oiliness compound, i.e. conditioner, to the hair and then wrapping the tied hair, which includes any and all portions of the hair pulled up for treatment, with a warming tool 12 (see Figs. 3 and 4; col. 1, lines 14-21; and col. 5, lines 6-36). The warming tool is of sheet form and has a plurality of heating parts 24-56, even numbers (see Fig. 2). The tool 12 leaves at least the part of the hair near the roots unwrapped.

Claim Rejections - 35 USC § 103

The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

(a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negated by the manner in which the invention was made.

Claims 5, 6, 7, 12, 13, and 14 are rejected under 35 U.S.C. 103(a) as being unpatentable over Zeoli-Jones (5,840,418).

Zeoli-Jones disclose the claimed invention except for explicitly mentioning that the conditioner includes an organic acid (claims 5 and 13) or is pH balanced (claims 6 and 14). However, it would have been obvious to one having ordinary skill in the art at the time the invention was made to provide a conditioner with an organic acid, since it has been held to be within the general skill of a worker in the art to select a known material on the basis of its suitability for the intended use as a matter of obvious design choice. *In re Leshin*, 125 USPQ 416. It is also noted that it is old and well-known to provide conditioners with an organic acid (see e.g. Chimento 5,270,035 col. 2, lines 6-16). It also would have been obvious to one having ordinary skill in the art at the time the invention was made to provide the conditioner with a slightly acidic pH between 2 to 4.5, since it has been held that where the general conditions of a claim are disclosed in the prior art, discovering the optimum or workable ranges involves only routine skill in the art. *In re Aller*, 105 USPQ 233. With regard to claims 7 and 12, it also would have been obvious to provide the oiliness compound with an emulsified state that is broken between about 55 and 60 degrees Celcius, again, since it has been held that where the

general conditions of a claim are disclosed in the prior art, discovering the optimum or workable ranges involves only routine skill in the art. *In re Aller*, 105 USPQ 233. It is noted that conditioners necessarily have some given pH level and some given temperature at which they are broken down from their emulsified state. Thus, it is merely a matter of obvious design choice to determine the optimum or workable ranges of these values, as set forth above.

Claim 15 is rejected under 35 U.S.C. 103(a) as being unpatentable over Viltro et al. (5,837,005) in view of Ono et al. (6,629,964).

Viltro discloses the claimed invention except for the water-absorbent polymer. Ono et al. discloses that moisture-retaining elements (of which vermiculite is one) "can contain a variety of components such as vermiculite, calcium silicate, silica gel, silica porous substances, alumina, pulp, wood powder, water-absorbing polymers, etc." Thus, it would have been obvious to substitute some or all of the vermiculite for an amount of water-absorbing polymers, in view of Ono et al., since this amounts to nothing more than the substitution of functionally equivalent moisture-retaining elements known in the art. It would have been further obvious to provide each of the components in the amount of approximately: 40-60% iron powder, 1-3% sodium chloride, 1-5% activated carbon, 3-5% water-absorbent polymer, and 3-10% vermiculite; since it has been held that where the general conditions of a claim are disclosed in the prior art, discovering the optimum or workable ranges involves only routine skill in the art. *In re Aller*, 105 USPQ 233.

Claims 16 and 17 are rejected under 35 U.S.C. 103(a) as being unpatentable over Viltro et al. (5,837,005).

Viltro discloses the claimed invention except for explicitly disclosing a heat-generating material in an amount of approximately 0.05-0.3 g/cm² of the heating part (claim 16) or explicitly locating the heating parts between 3-15 cm from the edge of the warming tool over the periphery thereof (claim 17). It would have been obvious to provide the heat-generating material in an amount of approximately 0.05-0.3 g/cm² of the heating part, and to locate the heating parts between 3-15 cm from the edge of the warming tool over the periphery thereof, since it has been held that where the general conditions of a claim are disclosed in the prior art, discovering the optimum or workable ranges involves only routine skill in the art.

Response to Arguments

Applicant's arguments have been considered but are moot in view of the new ground(s) of rejection.

Conclusion

The prior art made of record and not relied upon is considered pertinent to applicant's disclosure.

Any inquiry concerning this communication or earlier communications from the examiner should be directed to David C. Comstock whose telephone number is (703) 308-8514.


D. Comstock
14 June 2004


EDUARDO C. ROBERT
PRIMARY EXAMINER